without just cause or excuse, for more than 3 years before suit, and the continuance of such withdrawal for that period next preceding the suit, accompanied by willful conduct by the wife, consisting of groundless charges of infidelity by the husband, and of neglect by the wife of her marital duties with respect to attention to keeping the husband's room and bed clean, and with respect to his meals, thereby destroying home life, making the home an unfit environment for the children, and rendering the marriage state almost intolerable and impossible to be endured, held to constitute willful desertion warranting divorce.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 738.]

Error to Corporation Court of Alexandria.

Suit by Leonard L. Chandler against Rosa B. Chandler. From a judgment for plaintiff, defendant brings error. Affirmed.

T. Morris Wampler, of Washington, D. C., for appellant.
J. K. M. Norton, of Alexandria, for appellee.

FORTUNE *v.* COMMONWEALTH.

June 15, 1922.

[112 S. E. 861.]

1. Depositions (§ 69*)—In Murder Case, Taken at Coroner's Inquest, and Signed by Him at Witnesses' Request, Admissible.—In a trial for murder, it was error to exclude depositions taken at coroner's inquest, and there read to the witnesses, who authorized the coroner to sign for them, offered after laying a foundation as required by Code 1919, § 6216.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 566.]

2. Depositions (§ 88*)—Inaccuracy Affects Only Credibility, and Not Admissibility.—Mere inaccuracy of depositions affects only their credibility, not admissibility.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 571.]

3. Depositions (§ 76*)—Sufficiently Authenticated by Testimony of Coroner at Whose Inquest Taken.—In a trial for murder, depositions taken at a coroner's inquest and read to the witnesses who authorized the coroner to sign for them were sufficiently authenticated by the coroner's testimony to make them at least prima facie evidence of the testimony of these witnesses as given at the inquest.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 572.]

4. Witnesses (§ 379 (10)*)—Accused Entitled to Have Depositions Considered as Affecting Credibility of Testimony of Deponents at Trial.—In a prosecution for murder, accused was entitled to have the jury consider whether depositions taken at a coroner's inquest affected

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

the credibility of the same witnesses in their testimony at the trial, and, if so, to what extent.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 573.]

5. Witnesses (§ 405 (1)*)—Answer of Witness for Prosecution on Cross-Examination Held Not Conclusive on Accused, and Testimony to the Contrary Improperly Excluded.—The answer of a witness for the prosecution in a murder trial, denying on cross-examination that his deposition at a coroner's inquest had been verified by the coroner, was improperly held collateral matter, and conclusive upon accused, and the coroner's testimony to the contrary improperly excluded, being directly in issue, since it involved the credibility of this witness and of another who signed the depositions.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 968.]

6. Homicide (§ 118 (3), 119*)—One Attacked on Own Premises Need Not Retreat, but May Use Only Such Force as Necessary to Repel Attack.—A man attacked on his own premises is under no duty to retreat, and may resist the aggressor with such force as seems reasonably necessary to him as a prudent man to repel the attack, but may not use further force to subdue him or to compel him to leave the premises.

[Ed. Note.—For other cases, see 7 Va.- W. Va. Enc. Dig. 113.]

7. Homicide (§ 118 (3)*)—Right to Resist Attack Same within Curtilage as within Home.—One within his own curtilage, who is free from fault, when attacked by another, has the same right to stand at bay and resist assault, even to the taking of life, that one has when within his own home.

[Ed. Note.—For other cases, see 7 Va.- W. Va. Enc. Dig. 113.]

8. Homicide (§ 123*)—Killing of Implied Licensee, Who Has Entered Peaceably, Not Justified Merely to Punish, Subdue, or Compel Leaving of Premises.—One may not kill another, even within one's own home or curtilage, merely to punish or subdue him, or compel him to leave the premises, if he has entered peaceably on an implied license, and has no apparent intent to commit a felony.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 112.]

9. Homicide (§ 123*)—Life May Be Taken if Necessary to Prevent Forcible Entry of Dwelling, or Repel Attack Therein.—A man in his dwelling may use any means absolutely necessary to repel his assailant from his house, or prevent his forcible entry, even to the taking of life.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 112.]

10. Homicide (§ 300 (3)*)—Instruction Not Sufficiently Specific as to Right to Kill to Prevent Death or Great Bodily Harm.—A requested instruction that "if one who is free from fault in bringing on the difficulty is attacked by another upon his own premises in such a manner as would raise in a reasonable mind the belief that he is in imminent

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

danger of great bodily harm, and, if so impressed, he is not under any obligation to retreat, but may take the life of his assailant," does not sufficiently specifically point out that the right to kill begins and ends with the apparent necessity therefor in order to protect accused from death or great bodily harm.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

11. Homicide (§ 300 (5)*)—Instruction Referring to Order by Accused to Deceased to Leave Premises Held Misleading.—A requested instruction that, if "the deceased came with a companion upon the premises of the accused, and while there a quarrel arose between them, and accused ordered deceased to leave the premises, and deceased did not do so, but instead, without being himself assaulted, seized and threw a rock at the accused, and then advanced upon him with threats and gestures, reasonably giving him cause to believe that he was in danger of death or serious bodily harm, and that the accused did so reasonably believe, and, in what he believed the necessary defense of himself, shot the deceased," the accused was not guilty, was properly refused as misleading.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 158.]

12. Homicide (§ 116 (4)*)—Instruction that Man Assaulted Is Responsible Only for Reasonable Exercise of Judgment Improperly Refused.—A requested instruction that "a man, when assaulted, is held accountable under the law only for the exercise of such judgment as is warranted by the circumstances as they reasonably appear to him at the time," correctly stated the law.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

13. Homicide (§ 116 (2)*)—Instruction that, if Deceased Manifestly Meant to Kill Him, Accused Had Right to Kill, if Necessary, Improperly Refused.—A requested instruction that, "if defendant was assaulted by the deceased with such violence as to make it appear to defendant at the time that deceased manifestly intended and endeavored to take his life or do him some great bodily harm, and that the danger was imminent and impending, defendant was not bound to retreat, but had the right to stand his ground, repel force with force, and, if need be, kill his adversary to save his own life or prevent his receiving great bodily injury, and it is not necessary that it shall appear to the jury to have been necessary," correctly stated the law.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

14. Homicide (§ 800 (14)*)—Instruction as to Self-Defense Erroneous in Disregarding Accused's Actual Belief, and in Being Based on Belief of Reasonable Man.—An instruction that, if "a quarrel arose between the prisoner and deceased, and prisoner was without fault in provoking the assault, and accused ordered deceased to leave his premises, which he did not do, and deceased, without being himself

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

assaulted, seized and threw a rock at accused, and then advanced upon him with such violent threats and gestures that a reasonable man similarly situated would have believed that he was in imminent danger of death or serious bodily injury, and that it was necessary to kill deceased to protect himself from death or serious bodily injury, such killing was justifiable," was erroneous, as it omitted all reference to what accused actually believed and his actual motive.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

15. Criminal Law (§ 829 (1)*)—Instruction Fully Covered by Instruction Given Properly Refused, though Correct.—An instruction correctly stating the law applicable to the case was properly refused where its content was fully and better stated in an instruction which was given.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 158.]

16. Homicide (§ 116 (2)*)—Instruction that Actual Danger Not Essential to Right of Self-Defense Improperly Refused.—It was error to refuse an instruction that "it is not essential to the right of self-defense that the danger should in fact exist," as it correctly stated the law.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

17. Homicide (§ 307 (4)*)—Instruction that Killing Was Justifiable or Not, Erroneous as Withdrawing Question of Partial Justification, Constituting Manslaughter.—An instruction that the issue was whether the killing was "justifiable or not" was erroneous as tending to mislead the jury into the belief that partial justification and the question of voluntary manslaughter were withdrawn, notwithstanding voluntary manslaughter was defined in another instruction.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 158.]

18. Criminal Law (§ 823 (6)*)—Homicide (§ 300 (14)*)—Instruction Ignoring Test of Necessity of Killing as That Reasonably Regarded as Real by Accused Held Erroneous, and Not Cured by Another Instruction.—An instruction that "if, after deceased had thrown the rock which did not strike accused, and was advancing towards him, deceased had no other weapon, and that, if a reasonable man, similarly situated and armed, as was accused, would have used other less violent means to protect himself from said assault, or that the danger of death or serious bodily injury was not so imminent that the killing of deceased was then and there necessary for his protection, said homicide was not justifiable," was erroneous, as it made justification depend on actual necessity, ignoring the proper test, which is the necessity reasonably regarded as real by the accused, and this defect was not cured by an instruction embodying the test as that which "a reasonable man similarly situated" would have regarded as necessary.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 159.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Corporation Court of Lynchburg.

Heywood Fortune was convicted of murder in the second degree, and he brings error. Reversed, and new trial granted.

Aubrey E. Strode, of Lynchburg, for plaintiff in error.
John R. Saunders, Atty. Gen., for the Commonwealth.

HINES, Director General of Railroads *v.* GRAVINS.

June 15, 1922.

[112 S. E. 869.]

1. Libel and Slander (§ 6 (2)*)—Charge Plaintiff Connived in Theft of His Property from Railroad Is Slanderous.—An oral statement which, as explained by the inducement, colloquium, and innuendoes, charged that plaintiff sent the man who stole eggs consigned to plaintiff from the railroad car and had him bring the eggs to plaintiff's store, and that plaintiff thereafter made claim for the same eggs from the carrier, constituted common-law slander.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 255.]

2. Libel and Slander (§ 24*)—Proof of Publication Is Necessary to Recovery for Slander.—To sustain a recovery for slander at common law, it is necessary that there be a publication, so that a verdict for plaintiff cannot be sustained where no one besides the plaintiff heard the alleged slanderous remark.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 266.]

3. Libel and Slander (§ 24*)—Publication Unnecessary to Sustain Action for Insulting Words.—To sustain recovery under Code 1919, § 5781, for the utterance of insulting words tending to violence and breach of the peace, it is not essential that plaintiff prove a publication of the words, but it is sufficient if they were uttered in the presence of the plaintiff alone.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 266.]

4. Corporations (§ 423*)—Railroad Corporation Is Liable for a Slander Uttered by Agent within Scope of Authority.—A railroad corporation is liable for slanderous words uttered by an agent while he was acting in the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 265.]

5. Corporations (§ 423*)—Agent of Railroad Held Acting within Scope of Authority in Uttering Defamation.—Where the general agent of a railroad company whose subordinate was charged with the duty of issuing to a shipper shortage tickets, in discussing with plaintiff the latter's claim for shortage in a shipment of eggs, charged the plaintiff with having connived in the theft of the eggs, the agent in making a

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.